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No. 09-1172

In the Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the filing of a putative class action involving claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, tolled the CDA's requirement that a federal contractor asserting a claim against the government for breach of contract present that claim to a contracting officer within six years of the claim's accrual, when the failure to comply with the presentment requirement would have prevented such a claim from being litigated in the class action if a class had been certified.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 583 F.3d 785. The opinion of the Civilian Board of Contract Appeals (Pet. App. 27a-40a) is reported at 08-2 B.C.A. (CCH) ¶ 33,923.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2009. A petition for rehearing was denied on March 10, 2010 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on March 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 605 of Title 41 of the United States Code provides as follows:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision[.] * * * Each claim by a contractor against the government relating to a contract * * * shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. 605(a).

STATEMENT

1. a. Petitioner is a nonprofit organization that provides health-care services to members of Indian Tribes and Alaska Natives under contracts with the Indian Health Service (IHS). Pet. App. 2a; Pet. ii. The contracts are authorized by the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, which was enacted to promote tribal autonomy by permitting Tribes to manage federally funded services previously administered by the federal government. Pet. App. 2a-3a. Responsibility for the provision of such services is transferred to participating Tribes through self-determination contracts. *Id.* at 3a. Although the ISDA requires the federal government to provide self-determination contractors with the same amount of funding that the federal agency would have expended for the tribal programs if the government had continued to administer them, 25 U.S.C. 450j-1(a)(1), the ISDA did not originally require the federal government to pay an additional amount to cover the administrative costs incurred by Tribes to operate the programs. In 1988, Congress amended the ISDA to require the government

to provide contractors with funds to cover such costs. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

The 1988 amendments to the ISDA also provided that disputes regarding the performance of self-determination contracts are governed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.* Pet. App. 4a; 25 U.S.C. 450m-1(d). In 1994, Congress amended the CDA to require that any contract claim against the government must be presented to a contracting officer within six years after the claim accrues. 41 U.S.C. 605(a); Pet. App. 31a-32a. If a contracting officer denies a contract claim or does not act on it within a specified period, a self-determination contractor may appeal to the Civilian Board of Contract Appeals, see 41 U.S.C. 606, or to the Court of Federal Claims, see 41 U.S.C. 609(a)(1). Pet. App. 4a. The ISDA also permits a self-determination contractor to appeal an adverse decision from a contracting officer by filing suit in federal district court. See 25 U.S.C. 450m-1(a); Pet. App. 4a.

b. After the 1988 amendments to the ISDA took effect, various tribal entities filed several putative class actions (two of which are relevant to this case), alleging that the federal government was not meeting its obligation to provide funds to cover administrative costs associated with implementing self-determination contracts. Pet. App. 4a-5a. The first relevant putative class action ultimately resulted in a decision by this Court holding that the federal government could not avoid its contractual promise to pay administrative support costs by asserting that Congress had failed to appropriate sufficient funds specifically to cover those costs when Congress had appropriated sufficient unrestricted funds to

pay those costs. See *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 636-647 (2005); Pet. App. 5a. The second relevant putative class action had been stayed pending this Court's decision in *Cherokee Nation*. Pet. App. 5a-6a. The asserted class in that case consisted of "all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present." *Id.* at 5a (quoting *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006)). After the stay was lifted, the district court denied class certification on a number of grounds, including that "the existence of unexhausted claims"—*i.e.*, claims that had not been presented to a contracting officer in writing within six years of accrual as required by the CDA—"within the claims of the putative class [is] a jurisdictional defect, precluding class certification." *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 442-443 (D.N.M. 2007).

2. Petitioner Arctic Slope Native Association, Ltd., provides health-care services pursuant to a self-determination contract. Pet. App. 6a. Petitioner claims to have been a member of the putative class in *Pueblo of Zuni*. *Ibid.* On September 30, 2005—after this Court's decision in *Cherokee Nation* and before the district court's denial of class certification in *Pueblo of Zuni*—petitioner filed CDA claims with an IHS contracting officer. *Ibid.* Petitioner alleged that IHS had failed to pay the full amount of the administrative costs of the self-determination contract during fiscal years 1996 through 2000. *Ibid.*

At issue in the petition for a writ of certiorari are the claims for fiscal years 1996 through 1998, on which petitioner obtained no relief from the contracting officer. Pet. App. 7a, 33a. Petitioner appealed to the Civilian Board of Contract Appeals, which held that it lacked

jurisdiction to consider those claims because petitioner had not submitted them to a contracting officer within six years of their accrual, as required by the CDA. *Id.* at 7a; 41 U.S.C. 605(a). The Board rejected petitioner's argument that, because petitioner was a putative member of the class in *Pueblo of Zuni*, the six-year limitations period for filing its administrative claims had been tolled until the district court denied class certification in that case. Pet. App. 7a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-26a.

a. The court of appeals held that the CDA's six-year period for presenting a claim to a contracting officer was not subject to class-action tolling under Federal Rule of Civil Procedure 23. Pet. App. 9a-22a. The court of appeals acknowledged this Court's holding in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a putative class action tolls a statutory limitations period for individual claims by members of the class until class certification is denied. Pet. App. 9a-12a. The court explained, however, that such tolling is available only to "asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 9a (citation omitted). With respect to petitioner's claims regarding fiscal years 1996 through 1998, the court found that petitioner's failure to comply with the CDA's timely-presentment requirement would have rendered those claims ineligible for inclusion in the *Pueblo of Zuni* class action if a class had been certified in that case. *Id.* at 12a-18a. The court therefore concluded that the limitations periods applicable to those claims were not tolled by the filing of the *Pueblo of Zuni* class action. *Id.* at 18a-22a.

b. The court of appeals held that the six-year period for presenting claims to a contracting officer was subject to equitable (as opposed to class-action) tolling. Pet. App. 22a-26a. The court remanded the case to the Board for a determination of "whether, under the circumstances of these cases, the limitation period should be tolled." *Id.* at 26a.[1]

ARGUMENT

Petitioner seeks review of the court of appeals' determination that the filing of a class action pursuant to Federal Rule of Civil Procedure 23 does not toll the limitations period for presenting a claim under the Contract Disputes Act to a contracting officer. Further review of that question is not warranted at this time because the case is currently in an interlocutory posture. In any event, the court of appeals' resolution of the question presented is correct and does not conflict with any decision of this Court or any other court of appeals.

1. As an initial matter, review of the question presented is not warranted at this time because this case is in an interlocutory posture. Upon remand to the Civilian Board of Contract Appeals, petitioner will have an opportunity to argue that it is entitled to equitable tolling of the six-year presentment requirement with respect to its claims regarding fiscal years 1996 through 1998. If petitioner prevails on that issue, resolution of

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[1] The United States has not sought review of the portion of the court of appeals' interlocutory decision that held that the CDA's six-year time limit is subject to equitable tolling. The government's decision not to challenge that interlocutory ruling would not preclude the United States from seeking review of any future final order concluding that equitable tolling should in fact apply to petitioner's claims regarding fiscal years 1996 through 1998.

its claim to class-action tolling will have no effect on the outcome of the case. If petitioner is ultimately held not to be entitled to equitable tolling, it will be able to raise the class-action tolling argument—together with any other claims that may arise during subsequent proceedings in this case—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (expressing preference for review after all proceedings have concluded below); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002).

2. Petitioner asserts (Pet. 8-9) that the court of appeals' decision conflicts with decisions of the First, Sixth, and Eleventh Circuits. That is incorrect. The Federal Circuit in this case held that the filing of a putative class action does not toll the limitations period for filing an administrative complaint for claims that could not have been litigated in the class action if a class had been certified. Pet. App. 12a-22a. Petitioner identifies no court of appeals decision holding that the applicable limitations period should be tolled in this circumstance. Rather, the decisions on which petitioner relies hold that the filing of a class action tolls a limitations period for filing an administrative complaint when a litigant's failure to file or exhaust such a claim would *not* have precluded the resolution of the claim in the class action if a class had later been certified.

The Sixth and Eleventh Circuit decisions on which petitioner relies both held that the filing of a putative class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, tolls the time for individual

members of the asserted class to file an administrative complaint with the Equal Employment Opportunity Commission (EEOC). See *Griffin* v. *Singletary*, 17 F.3d 356, 359-361 (11th Cir. 1994), cert. denied, 513 U.S. 1077 (1995); *Andrews* v. *Orr*, 851 F.2d 146, 148-149 (6th Cir. 1988). This Court has held, however, that the filing of a claim with the EEOC is not a jurisdictional prerequisite to filing a Title VII suit in district court, and that an individual plaintiff's failure to file such an administrative claim does not preclude that individual from inclusion in a Title VII class action. See *Zipes* v. *TWA, Inc.*, 455 U.S. 385, 392-398 (1982); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (recognizing that claims may be sustained on "a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members"). The same is not true of claims under the CDA.

The ISDA and the CDA together require that a self-determination contractor present its contract dispute to a contracting officer in writing within six years after the claim accrues. 25 U.S.C. 450m-1(d); 41 U.S.C. 605(a). Compliance with the six-year presentment requirement is a jurisdictional prerequisite to pursuing a CDA claim in the Court of Federal Claims or a district court, or before the Civilian Board of Contract Appeals. Because petitioner did not satisfy that requirement with respect to the claims at issue, it would not have been eligible for inclusion in the *Pueblo of Zuni* class if a class had been certified in that case. See *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 442-443 (D.N.M. 2007). Indeed, the petition for a writ of certiorari does not contend that petitioner's claims could have been litigated in *Pueblo of Zuni* if the district court had certified a class. The court of appeals decisions applying class-action tolling rules to

Title VII's EEOC filing requirement therefore do not conflict with the Federal Circuit's decision in this case.

The court of appeals' decision in this case likewise does not conflict with the First Circuit decision on which petitioner relies. In *McDonald* v. *Secretary of Health & Human Services*, 834 F.2d 1085, 1088-1092 (1987), the First Circuit held that the district court in that case had the authority to revive timely-filed administrative complaints that had not been timely exhausted during the pendency of a class action in which the claimants were members of the certified class. This case differs from *McDonald* in two important respects.

First, whereas petitioner failed to initiate administrative proceedings in a timely manner by presenting a claim to the contracting officer within six years after the claim accrued, the revived claims in *McDonald* had been timely filed before the initial agency decisionmaker and therefore satisfied the analogous limitations period. Second, the First Circuit in *McDonald* expressly limited its decision to the circumstances of that case, in which the prior course of proceedings had induced the parties to conclude that exhaustion was not required. The First Circuit explained that the parties and the district court had been "entitled to assume that [the court of appeals] did not question the [district] court's jurisdiction over the class members" because the court of appeals had previously ruled on the merits of the class members' claims without finding that the class had been improperly certified. *McDonald*, 834 F.2d at 1091. The court stated that, "[h]owever the need for exhaustion might be viewed as an initial matter, there are special factors leading us to affirm the district court's jurisdiction and judgment at this late stage in the litigation." *Ibid.* Peti-

tioner identifies no analogous "special factors" present in this case.

3. There is also no merit to petitioner's contention (Pet. 10-12) that the court of appeals' decision conflicts with this Court's decisions in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983) (*Crown*); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974); and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) (*American Pipe*). The Court held in those cases that class-action tolling applies to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554; see *Crown*, 462 U.S. at 349 (same); *Eisen*, 417 U.S. at 176 n.13 (citing *American Pipe*). That is consistent with the court of appeals' decision, which held that class-action tolling does not apply to petitioner's claims for fiscal years 1996 through 1998 precisely because those claims could not have been resolved in the *Pueblo of Zuni* class action if the class in that case had been certified. See Pet. App. 12a-22a; see also *id.* at 21a (noting that the rationale of *American Pipe* "would protect any potential class member over whom the court could exercise jurisdiction by class certification, but not parties, such as those who have failed to exhaust mandatory administrative remedies, over whom the court may not exercise jurisdiction"). This Court's decisions therefore do not support petitioner's contention that the time for presenting its claims to a contracting officer was tolled by the pendency of a putative class action in which those claims could not have been litigated.

4. As the court of appeals explained (Pet. App. 18a-19a), the scheme petitioner proposes would make little sense because the tolling petitioner seeks would put it in a better position than if the class in *Pueblo of Zuni* had

been certified. If the class had been certified in 2007, petitioner's claims as to fiscal years 1996 through 1998 could not have been litigated in the class action because petitioner had not satisfied the administrative presentment requirement. There is no reason to allow petitioner to pursue such claims belatedly simply because the class ultimately was not certified.

For similar reasons, petitioner is likewise incorrect in arguing (Pet. 12, 13) that the court of appeals' decision will "foster[] unnecessary litigation and uncertainty" and "defeat[] the very purpose of" the class-action tolling rule. As the court of appeals explained (Pet. App. 9a-10a), that tolling rule obviates the need for putative class members to protect their rights by filing individual complaints that will be rendered superfluous if a class is ultimately certified. That concern is not implicated in the present context, however, since any class action that might have gone forward would have been limited to claims that were timely presented to a contracting officer. Because presentment of petitioner's claims to a contracting officer would not have been a wasteful act even if the court in *Pueblo of Zuni* had certified a class, tolling those claims would not serve the purpose that the class-action tolling rule is intended to achieve.

On the contrary, applying class-action tolling here would undermine judicial efficiency. Because individual CDA claimants must present their claims to contracting officers before they can participate in class actions, tolling the presentment deadline would unnecessarily delay the filing of the administrative claims without avoiding the presentment requirement. And as the court of appeals noted, presentment in the circumstances of petitioner's case would have served the "useful function of

apprising the government of the amount that is potentially at issue in the class action suit, which promotes the notice function that is part of the justification for the presentment requirement in the first place." Pet. App. 21a. Notice to the federal government of damages claims is especially important in CDA cases because the CDA grants "agencies to which claims are presented * * * broad settlement authority," which can prevent litigation from occurring at all. *Id.* at 16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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